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In the Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1204

FRASER & JOHNSTON COMPANY, a corporation,
Petitioner,

vs.

LODGE 1327
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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The respondent, LODGE 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, opposes the Petition for Writ of Certiorari heretofore filed by FRASER & JOHNSTON COMPANY, and respectfully prays that the petition be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported, but is accurately reprinted in the Appendix to the Petition.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

In respondent's view, the first and second "questions presented" as stated in the Petition (p.2) are more accurately stated in a single question as follows:

> "Whether a party to a labor dispute who seeks relief concurrently through the National Labor Relations Board and the grievance and arbitration machinery of the applicable collective bargaining agreement is precluded from proceeding to arbitration by reason of the fact that the Board has decided portions of the dispute in its favor, under circumstances in which the other party is resisting enforcement of the Board's decision, and in which the relief sought in arbitration extends beyond the relief granted in the Board's decision."

The third question stated by the Petition (p.2) is more accurately stated as follows:

> "Whether summary judgment to compel arbitration as to the applicability of a collective bargaining agreement to a new plant is proper where the dispute involves the interpretation and application of the agreement, and the arbitration clause provides that grievances concerning "interpretation or application" are matters for arbitration."

The fourth question stated by the Petition (p. 2) is more accurately stated as follows:

> "Whether the Circuit Court of Appeals properly denied Petitioner's opposition to arbitration based on a claim of laches, where that claim was not raised or relied upon in the trial court, and where there is no evidence to support the claim."

STATEMENT OF THE CASE

Petitioner's statement of the case is accurate as far as it goes. The following additional facts may be helpful to the Court in passing upon the Petition:

1. The Petition states (p.3) that "Respondent failed to follow the grievance procedure called for in the collective bargaining agreement in that it did not comply with the four steps of grievance processing required as a prerequisite to arbitration". The facts are that the Respondent submitted a grievance to Petitioner, pursuant to the contractual grievance-arbitration procedure, and Petitioner promptly returned the grievance to Respondent, refusing to process it on the stated ground that the contract had terminated upon plant closing and that in any event it did not present an arbitrable issue. Respondent was thereby precluded from processing the grievance further, except with judicial aid.

2. The Petitioner has declined to comply with the NLRB decision in *Fraser & Johnston Co.* 189 NLRB No. 17, and the Board's Order in that case, rendered in March of 1971, is still pending for enforcement before the Ninth Circuit Court of Appeals. The actions of the Petitioner complained of in the Board proceeding and in the proposed arbitration proceeding began with layoffs of employees in May of 1969.

3. In the arbitration proceeding the Respondent is seeking relief which includes making persons employed at the Petitioner's new location whole for the difference between the wages and benefits received and the wages and benefits they should have received under the agreement. That relief appears to go beyond what the Board has ordered. (See Appendix to Petition, page 5, footnote 7).

ARGUMENT

All of the questions presented were properly decided by the Circuit Court of Appeals in accordance with prior decisions of this Court and of other Courts of Appeals. None of them presents novel issues compelling this Court's attention.

1. The Preemption Question.

In *Smith v. Evening News*, 371 U.S. 195 (1962), this Court held that federal jurisdiction over suits to enforce a collective bargaining agreement is unaffected by potential, or even actual N.L.R.B. jurisdiction. In *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), this Court applied the *Smith* principle to order arbitration of a dispute concerning coverage of a collective bargaining agreement even though the dispute (because it involved two unions) raised issues over which the NLRB might also have jurisdiction. The Court of Appeals correctly applied that principle to the instant case.

Petitioner would distinguish *Carey* on the ground that here "the Board has already decided the matter", and it lists a number of hypothetical situations in which conflict between the Board's Order and an arbitration award might arise. (Petition, p.8). Petitioner thereby ignores the fact that Respondent has rights under its collective bargaining agreement which are, to some extent, independent of its rights and the rights of employees under the National Labor Relations Act. Certainly an arbitrator knowledgeable in labor relations matters will pay due deference to the Board's decision, and if he fails to do so a court may decline to enforce the award. Respondent should not lose the right to relief premised upon the agreement, or the right to additional relief not encompassed within the Board's remedies, simply because Petitioner has successfully resisted arbitrating until after the Board's decision.

2. The Propriety of the Summary Judgment.

Petitioner attacks the Summary Judgment as improper because there existed material questions of fact as to whether the collective bargaining agreement was intended to apply to petitioner's new plant. But application of the

agreement to the new plant lies at the core of the issues to be arbitrated. To argue that the Court should determine that issue on its own is equivalent to arguing that it should not go to arbitration at all. In light of the contract language which makes disputes over "interpretation or application" matters for arbitration, that argument is clearly contrary to the teachings of this Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In any event, the Labor Board has determined the issue of contract applicability in favor of Respondent, and the Court as well as an arbitrator would be bound by that determination on the basis of *Carey v. Westingtouse Electric Corp.*, 375 U.S. 261 (1964).

3. The Defense of Laches.

Petitioner seeks to invoke this Court's certiorari jurisdiction on the ground that the case involves an issue presently pending before the Court on a grant of certiorari, as to whether questions of delay in seeking arbitration, such as laches, should be decided by the Court or by an arbitrator. But the Court below expressly found it unnecessary to decide that issue for two reasons: first, because laches was not raised or relied upon in the trial court; and second, because there was no evidence to support the claim. The petition for certiorari states no facts in contradiction of those findings.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 12, 1972.

Respectfully submitted,

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